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Supreme Court of the United States

OCTOBER TERM, 1945

No. 737

HOMER C. ZINK, Comptroller of the Treasury of
New Jersey, et al.,

*Petitioner and
Respondent-Appellee below.*

vs.

CITY OF JERSEY CITY, a municipal corporation
of New Jersey, et al.,

*Respondents and
Relators-Appellants below.*

On Petition for Certiorari to the Court of Errors and
Appeals of New Jersey.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.

BENJAMIN C. VAN TINE,
*Deputy Attorney-General,
Counsel for Petitioner.*

WALTER D. VAN RIPER,
*Attorney-General of New Jersey,
Of Counsel.*

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STATEMENT.

We respectfully pray leave to submit this reply brief in support of petition for a writ of certiorari in the above-entitled cause.

The statement by the respondent (B. pg. 7) that the petitioner "urged that the decision of the Court *denied* to New Jersey a republican form of government" is incorrect. We have tried consistently to maintain the distinction set forth in our petition herein. Our argument before the New Jersey Court of Errors and Appeals on this point is set

forth on pages 5 to 8 of the petition for reargument.
(R. pg. 187-190)

SUMMARY OF ARGUMENT.

I. In reply to respondents' argument concerning the applicability of Article IV, section 4 of the United States Constitution.

(a.) Concerning the timeliness of the objection.

(b.) Concerning the applicability of Article IV, section 4 in any case.

II. In reply to respondents' argument concerning the status of the petitioner.

III. A review in the instant case would be in vindication and defense of the sovereignty of the people of the State of New Jersey.

ARGUMENT.

I.

In reply to Respondents' argument concerning the applicability of Article IV, Section 4 of the United States Constitution.

The respondent has argued that there is no power in this Court to review this judgment on the complaint of the petitioner that the action of the New Jersey Court of Errors and Appeals has in some manner violated Article IV, section 4 of the United States Constitution (a.) because the question was not raised below and (b.) because in any event the said article does not give this Court the power to review the judgment in question.

(a.) Concerning the timeliness of the objection.

It is apparent that the respondent has misunderstood the argument of the petitioner. The constitutional question raised before this Court is not separate and apart from the State constitutional questions raised in the first instance. We still insist that it was the violations of the State Con-

stitution which has made the judgment below a nullity and primarily those violations only. We urge that since the violations were in contravention of the government established by the people pursuant to the guarantee of the Federal Government, the Court of Errors and Appeals has by its action offended against the Federal Constitution or at least by its action has given this Court the power to review the unlawful, the unconstitutional, judgment—the said power being an incident of the guarantee afforded by Article IV, section 4 of the Constitution of the United States.

We urged below that, since the Court was called upon to determine whether or not there was an appropriation by the Legislature, such undertaking constituted a suit against the State. As we pointed out in the petition (pg. 3), the said Court, by the very question it propounded as being necessary of solution, (T. pg. 153) disclosed that the action did in fact constitute such a prohibited suit.

It remained, however, for the brief of the respondent to disclose with finality the vice of the whole situation. It is there made apparent that no one can discuss the result of this case without such disclosure. The respondent says at page 13 of its brief:

“The contention in the brief of petitioner that he is appearing as the *alter ego* for the State of New Jersey obviously begs the question as to whether the *New Jersey statute, properly construed*, did not impose upon him a mere ministerial duty to distribute certain moneys in the state treasury to various political subdivisions of the state.”

and at page 14:

“The New Jersey Court of Errors and Appeals has determined that the *New Jersey statutes, properly construed*, calls for the exercise by the State Comptroller of the ministerial function of distribution of the moneys here in question to certain municipalities.”
(Italics ours.)

Quite obviously the act of "properly construing" a statute to determine whether or not it has made an appropriation is a suit against the State because if one construction is placed upon the language, the money remains with the State—if the other, it belongs to a certain few municipalities. What more could be wanted to bring a cause within the sovereign immunity? It was to avoid just such situations that the rule of sovereign immunity has been developed. We have been able to find no instance and the respondent has referred to no case where, on similar facts, it has been held that the action did not constitute a suit against the State. The suggestion on page 14 of respondent's brief that the construction placed upon the act by the New Jersey Court is conclusive upon this Court presupposes jurisdiction. There is no such rule in a case where the Court was without jurisdiction and, where as in the instant case, its action constituted usurpation.

The Court below was fully informed concerning the defense of immunity from suit. Nevertheless it did take jurisdiction. By so doing it violated certain provisions of the New Jersey Constitution. It was the taking of such jurisdiction and the violating of the said Constitution which the people of the State of New Jersey now claim has given rise to certain rights that the State has as an incident to the guarantee of a republican form of government contained in the Article IV, section 4 of the Constitution of the United States. The quantum of such right we are frankly unable to determine because such question has never been answered. It certainly should extend sufficiently to authorize this Court to review the unauthorized judgment in order to determine whether such judgment does do violence to the New Jersey Constitution in a case where but for such remedy there would be no other orderly judicial method for review. It was the usurpation of the highest Court of New Jersey which we believe created a controversy arising under the Constitution of the United States.

We did not anticipate such usurpation. Nor do we believe that it is ever required that a litigant anticipate an unconstitutional act on the part of the Court itself. Nor could we assume that even if the New Jersey Court had known sooner that its violations of the New Jersey Constitution would be reviewable by this Court, the New Jersey Court would have acted otherwise. Any such assumption could only mean that the usurpation was conscious and deliberate. We make no such charge. It is with usurpation in the sense of its use in the law with which we are concerned—with the results and not the motives. In *ex parte Sawyer*, 124 U. S. 200, 221, the distinction between an absolute want of power and its defective use is clearly pointed out. In *Voorhees vs. Jackson*, 10 Peters 449, 474, this Court discussed the boundary between an error in judgment and the usurpation of power. It is with this distinction that we are presently concerned.

If there is a right in the State, as an incident to the guarantee of a republican form of government, to have the government so established given a certain degree of protection in a given case, then a Federal question has arisen by the unlawful action of the New Jersey Court of Errors and Appeals in the instant case, and the judgment, which is a nullity, may be set aside by this Court. The State has done all within its power to forestall the entry of the improper judgment and this appeal is timely.

(b.) Concerning the applicability of Article IV, Section 4, in any case.

The respondent (B. pg. 9) states that this Court has no jurisdiction under Article IV, section 4, in any event—that this “Court has no jurisdiction to adjudicate that state action of any nature violates the federal guaranty to the states of a republican form of government.”

We do not claim that the present situation presents “state action.” We claim it is usurpation and contrary to the constitutional grant of power to the Court of Errors and Ap-

peals. We have requested this Court to determine whether such action is violative of the said Article IV, section 4. The respondent has absolutely no authority for its broad assertions concerning the applicability of the said section because a case has never been reported which is similar to the instant case. In none of the cases reported was the Court reviewing an unconstitutional act of the State Court itself.

Had this question arisen during the period when Chief Justice Marshall delivered his monumental opinions, we have the feeling that this Court would have assumed jurisdiction. It is true that we have come a long way without the need of the rule proposed becoming apparent. But if the power existed at that time, it still remains today. Many powers heretofore unrealized still lie dormant in our great Constitution. As was said many years ago by the Chief Justice in *McCulloch vs. Maryland*, 4 Wheat, 316, 405:

“But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.”

To repeat, we have been unable to find a single case where unconstitutional acts—usurpations by the Court itself—were involved and where there was presented the urgent need for a review by an impartial tribunal to declare a judgment predicated upon such unconstitutional acts a nullity. The need being present, the learned Justice who said in the same case at page 421:

“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”

would surely have found that jurisdiction exists in the instant case. We do not advocate some new and revolutionary power. We respectfully suggest only that just as in *McCulloch vs. Maryland*, *supra* (pg. 411), it was found that the power to create a corporation was

“never the end for which other powers are exercised, but a means by which other objects are accomplished.”

so in the instant case, the rule which we advocate would aid in the orderly working of the republican form of government established by our people under the guarantee of Article IV, section 4, of the Federal Constitution. Nothing could be more logical than that the several organs of Federal Government should undertake to assist when the State Government so guaranteed fails to function properly because of a usurpation on the part of the judiciary. We repeat that the need is present—the remedy is in the best traditions of our judicial system. This Court without doing violence to any precedent could undertake that review.

Such review would not be an interference with State sovereignty. It would be in support of the integrity of that sovereignty and would prevent the will of the people from being thwarted. The usurpations—the unconstitutional acts are not the acts of the sovereign but in contravention of the sovereign will. A review of such acts being in support of the sovereign right to have its Constitution respected and held inviolate would lend strength to our constitutional system.

In *Marbury vs. Madison*, 1 Cranch 137, 176, the Chief Justice said:

“To what purpose are powers limited and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”

This is apt in considering the powers of the New Jersey Court under the State Constitution. But we go further and inquire what is the purpose of the guarantee of a republican form of government by the United States Constitution, if as in the instant case, where there can be shown a clear usurpation which will cause great damage to the State unless a remedy for review is found, this Court, the only possible forum for such purpose, is powerless to grant that review?

We believe we shall be able to demonstrate that this Court has the power to review the judgment in question. In conclusion of this point we refer to the closing remarks of the great Chief Justice in *Marbury vs. Madison*, *supra*, page 180. The author of such sentiments must have considered that the right of review existed in this Court in a situation such as is presented by the instant case.

II.

In reply to Respondent's argument concerning the status of the Petitioner.

In our original brief we stated that the petitioner in the instant case is the *alter ego* of the State of New Jersey. The respondent apparently takes the view that the State may never be a petitioner before this Court if it acts through its duly authorized officers and cites cases supposed to support such premise. None of such cases are in point.

In *Smith vs. Indiana*, 191 U. S. 138, an auditor sought to test the constitutionality of a tax act not because of any interest the State had in the matter but because of the alleged interest of individual taxpayers, who should have acted for themselves. He was not the *alter ego* of the State but an unauthorized champion of certain others.

Braxton County Court vs. West Virginia, 208 U. S. 192, and *Clark vs. Kansas City*, 176 U. S. 114, are similar to the *Smith* case. In *Marshall vs. Dye*, 231 U. S. 250, the Court was dealing with legislation providing for the submission of a new constitution. In none of these cases did the State

officers have a concern in the matter. Our case is altogether different.

The respondent urges (B. pg. 14) that this Court is bound by the result in the instant case. If we are correct in our assumption and this was a suit against the State, the judgment is a nullity and this Court is not so bound. In the latter event, as the result of such judgment, the Comptroller will be required to pay out a large sum of money which belongs to the State of New Jersey. In this present proceedings the petitioner appears as the *alter ego* of the State against which an improper judgment has been entered. A situation exists entirely different from that which arose in the cases cited by respondent and commented upon above.

The status of the parties is clearly set forth in the recent case of *Ford vs. Department of Treasury of Indiana*, 65 S. Ct. 347, 350, wherein Mr. Justice Reed said for this Court:

"We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. *Ex parte Ayers*, 123 U. S. 443, 490, 499, 8 S. Ct. 164, 174, 175, 31 L. Ed. 216; *Ex parte State of New York*, 256 U. S. 490, 500, 41 S. Ct. 488, 590, 65 L. Ed. 1057; *Worcester County Trust Co. vs. Riley*, 302 U. S. 292, 296, 298, 58 S. Ct. 185, 186, 187, 82 L. Ed. 268. And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. *Smith vs. Reeves*, *supra*; *Great Northern Life Insurance Co. vs. Read*, *supra*. We are of the opinion, therefore, that the present proceeding was brought in reliance on § 64-2614 (a) and is a suit against the state."

The judgment in the instant case is in effect against the State of New Jersey. For want of jurisdiction it is a nullity. The present petition has been filed on behalf of the State of New Jersey for the purpose of having this Court review and set aside such judgment under authority contained in the United States Constitution. The petitioner as the *alter ego* of the State is the proper person to make such petition because, in such capacity, he was sued below.

III.

A review in the instant case would be in vindication and defense of the sovereignty of the people of the State of New Jersey.

Chief Justice Marshall has drawn a clear distinction between the State as a government and the people of the State, who are the ultimate source of sovereignty. It is the people of the State to whom the Federal Government has guaranteed a republican form of government. When the Court of Errors and Appeals of New Jersey in the instant case usurped the powers of the Legislature, it did not offend against the Legislative branch but against the people and it is they who now seek an independent review of the unconstitutional acts to the end that the judgment resulting therefrom shall be declared to be a nullity.

In any such similar instance of usurpation, a fair and impartial review should be available. The rule proposed by the petitioner would provide such review and fill a present apparent lack in our governmental system. It will act as a deterrent upon future acts of usurpation by courts which would not otherwise be subject to review. Nor is it contrary to the theory of State sovereignty. Rather it is in justification of such sovereignty, for, remembering that it is the people and not the government which is sovereign, the rule proposed would assure a more perfect working of that government which the people have formed for the purpose of governing themselves. Thus we would have a check upon the other branches of our government by the State

Courts and upon the Courts themselves, not otherwise checked within our State Constitution itself, by review before this Court as an incident of the guarantee afforded to the people by Article IV, section 4 of the United States Constitution.

We must deny the unnecessary and discourteous statements of the respondent concerning the motives for the present appeal. (B. pg. 7.) We assure this Honorable Court that the petition was not filed for purposes of delay but in the earnest and sincere hope that the present action might result in establishing law that will make for a more orderly working of our governmental system. The distinction that we make concerning questions that have arisen under Article IV, section 4 of the Federal Constitution, are not illusory but fundamental and real. In cases heretofore considered the question was as to what constituted a republican form of government. It contemplated the future operation of the government. The action complained of went to the form of government itself, the complaint being that thereafter there would not be a republican form of government in operation. In such a situation, there was a political question involved. It was for Congress to determine whether it would recognize such changed government if, in fact, there had been a change.

But that is not our case. Our inquiry is not directed toward the form of government that will exist hereafter but rather with a breakdown in the operation of an existing government established by the people under the guarantee contained in Article IV, section 4 of the United States Constitution. The orderly operation of that government has been interfered with by an act of usurpation by the highest Court of the State. There is no method of review afforded by the State Constitution. Unless a review may be had before this Court, the State will suffer great loss. The people of the State have as an incident of the aforementioned guarantee requested a review of the wrongful acts to the end that their sovereignty may be maintained. If

permitted a review, the State will not only show the need for such a rule but the applicability of the rule proposed to the guarantee contained in Article IV, section 4 of the United States Constitution will be demonstrated.

In conclusion we point out that in the final analysis the people are sovereign. The people created our dual system to govern themselves—in order to form a more perfect union. The several agencies of the government so established may only act within the limits of their delegated authority. The Court of Errors and Appeals of New Jersey has exceeded those limits. The present review is in vindication and defense of the sovereignty of the people of the State of New Jersey.

CONCLUSION.

It is respectfully submitted that the application for a Writ of Certiorari should be allowed.

Respectfully submitted,

BENJAMIN C. VAN TINE,
Deputy Attorney-General,
Counsel for the Petitioner.

WALTER D. VAN RIPER,
Attorney-General of New Jersey,
Of Counsel.